Supreme Court, U. S.
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No. 80-1180

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR., and THE ESTATE OF OLAF HENRY NELSON, Deceased,

Petitioners,

v.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. 78-1065

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QUESTIONS PRESENTED

1. Whether, after Las Vegas Nos. 1, 2, 7, 18 and 27 (five 80-acre claims) a total of 400 acres, were examined and discovery on each claim was established, and the Director of the Bureau of Land Management had promised to clear-list the claims for patent, and patent to 400 acres had been issued but then canceled, and reissued to the extent of 230 acres, and the IBLA ordered that patent should issue to another 30 acres, leaving 140 acres contested here, it was error to deny petitioners their five full 80-acre claims and to reduce such claims by 14 ten-acre tracts under agency policy, the so-called "mineral in character" rule, the "too much" or excessive reserves rule, and the "ten-acre " rule reducing the statutory size of the claims patented.

2. Whether, where issuance of patent to a portion of a placer mining claim has recognized that a general market existed for the mineral in the deposit on the claim, it was

error to exclude from the patent other ten-acre subdivisions in the same claim unless the agency was satisfied that an actual mining operation had been conducted on each ten-acre tract prior to July 23, 1955.

3. Whether public resentment of excessive bureaucracy and its cost and the resentment of bureaucracy's claiming to own some 86% of the land in Nevada presents a constitutional crisis of sufficient importance to call for issuance of the writ to review on the merits petitioners' patent application Nevada 012928.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following members of the agency were named below:

John S. Boyles, District Manager, Bureau of Land Management; William J. Malencik, Chief, Division of Technical Services, Bureau of Land Management; E. I. Rowland, State Director, Bureau of Land Management, Curt Berklund, Director, Bureau of Land Management.

In our view, it is sufficient to name the present Secretary of the Interior, Cecil D. Andrus, instead of Thomas S. Kleppe, who held that office when the District Court case was filed.

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OPINIONS BELOW

(Reproduced in the Appendix hereto)

The Opinion of the United States Court of Appeals for the Ninth Circuit in Case No. CA-781065, is reported in U.S. It is set out A-1

The Order Denying Petition for Rehearing was entered without opinion.A-10

The Findings and Recommendation of the Magistrate, adopted without opinion by the Honorable Robert D. Foley, United States District Judge for the District of Nevada in Civil LV-76-155 RDF Nov. 4, 1977 is unreported. They are set out A-12.

The Decision of the Interior Board of Land Appeals, July 26, 1977, reversing the Hearing Examiner as to tracts in Las Vegas 1 and 2 and affirming as to tracts in Las Vegas Nos. 7, 18 and 27, is reported in 7 IBLA 21 and in 79 I.D. 457. It is set out A-21

The unreported decision of the Hearing Examiner in Contest N-012928 is set out in the Appendix A-41.

JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from October 17,1980, when the United States Court of Appeals for the Ninth Circuit entered its order denying petition for rehearing.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

STATUTES INVOLVED

(In pertinent part only)

30 U.S.C. Sec 22. Lands open to purchase by citizens.

> "Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States..."

30 U.S.C. Sec. 35 Placer claims

> "Claims usually called "placers", including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims: . . . "

30 U.S. C. Sec 611 Common varieties

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws; . . .
> (July 23, 1955)

STATEMENT OF THE CASE

Facts material to consideration of the questions presented are as follows:

The United States District Court for the District of Nevada, Las Vegas Division, was the federal court of first instance in which the petitioners sought judicial review of the administrative rejection of patent to certain ten-acre tracts in mining claims as to which discovery was acknowledged to have been made. Under 28 U.S.C. Section 1331, the district court had jurisdiction to hear this case arising under the mining laws of the United States, brought against an agency of the United States.

The Court of Appeals had jurisdiction to hear the appeal from the decision of the District Court under Title 28 U.S.C. Sec. 1291.

This case concerns denial of patent application to portions of three of the 80-acre association placer claims applied for in patent application Nevada 012928, after issuance or approval of patent had been made by the Interior Department as to other portions of the same mining claims. Petitioners contend that the affirmance of the administrative decision by the court below has erroneously given judicial approval to alteration of the mining law from the way it was enacted by Congress through application of agency policies which the agency lacks authority to enforce.

The Las Vegas group of sand and gravel placer mining claims (Las Vegas Nos. 1 through 27) comprising 2,160 acres in all, was located by Vernon D. Bradley and others on March 20, 1948. A-23. On June 1, 1948, the four locators conveyed the group of claims to Olaf H. Nelson, who operated the claims successfully until he retired in 1951. A-23, Tr 83, 84.

On September 24, 1952, Mr. Nelson conveyed a one-half interest in the

group of claims to William A. McCall, Sr. A-12.

On March 27, 1953, Nelson and Mc Call filed application Nevada 012928 for patent to all 27 claims. A-23

On August 8, 1954, a final certificate for all 27 claims was issued by the Bureau of Land Management acknowledging payment of the $5,200.00 purchase price for the claims. A-24

The administrative file on patent application Nevada 012928 contains a letter written May 11, 1955, by Edward Woozley, Director of the Bureau of Land Management, quoted at p. 5 of petitioners' Opening Brief to the Court of Appeals, in which Mr. Woozley urged the Nevada State Supervisor of the Bureau to expedite issuance of patent to five claims, including those here in question, which "examination has indicated to be clearly valid."

Another letter in the administrative file, reproduced in the appendix to the same Opening Brief, contains an affidavit of George Monahan, Registered Professional Engineer, stating:

"I, George Monahan, a duly appointed Resident Engineer for the Department of Highways, State of Nevada, during the years 1948, 1949 and 1950, do hereby certify I have inspected the Placer Claims leased by O. H. Nelson as shown by the map. I also tested samples taken from the claims and found the material to be of high quality which could be processed to meet the State specification for Type 1 Base Material; Type 2 Surfacing and Plant Mix Aggregate. The processed material met all the requirements for concrete aggregate when washed and blended. The Claims with conglomerate and cemented material can be made to conform to specifications by blasting or the use of a ripper to break and loosen the material.

"I herewith certify that the various aggregates used in the construction of the Main Street Bonanza Project 1948 and the Charleston Boulevard storm sewer project 1949 and 1950 came from the Placer Claims shown on the map. These claims have high commercial value due to the high quality and quantity and the close proximity to the Las Vegas Market. Extensive improvements have been made on the Placer Claims over a period of approximately eight years, including roads, wells, reservoirs and exploratory work."

Also in the appendix to the Opening Brief to the Court of Appeals is reproduced a letter furnished to the Bureau of Land

Management by Nelson and McCall to provide further information concerning Mr. Nelson's production and sales of material from the claims here in question in 1948. The letter states in part:

> "Most of the aggregates taken from the claims were processed to meet the specifications of the State of Nevada Department of Highways, and purchased by the State of Nevada, for the construction of the State Highway project, in the City of Las Vegas, Nevada, which was awarded to the Olof Nelson Construction Co., Logan, Utah, in the amount of $253,204.86.
>
> "On November 9, 1948 the Olof Nelson Construction Co. was awarded the contract to construct the Charleston Blvd. underpass and storm sewer in the amount of $746,227.89. All the aggregate to complete the project were processed to meet State specifications and were purchased by the State of Nevada. The materials required to complete the contract included ballast, trench gravel, Type 1 and 2 base course surfacing, special cushion sand, plant mix aggregates, coarse rock and sand for concrete and high quality rock and sand for 3½ miles of large size concrete pipe.
>
> * * *

> "In regard to conglomerate, calechi and cemented material on the claims, I wish to state that a great deal of the hard pan material was ripped loose and mixed with the loose rock and sand with no detrimental effect to the aggregate used for Type 1 and Type 2 surfacing. The crushed material to be processed for specification concrete aggregate containing calechi fines were also approved after washing and scrubbing at very little extra cost."

The letter reported the many thousands of yards taken from each of Las Vegas claims Nos. 1, 2, 7, 18 and 27 for the projects.

On October 20, 1958, Walter Koch, Area Minerals Officer reported to the State Supervisor BLM for Nevada that equitable title to Las Vegas Claims 1, 2, 7, 18 and 27 passed to the claimants October 8, 1954, for those claims had a valid discovery of mineral, based on the marketability factor and on the fact that as of this date the marketable sand and gravel had not been depleted. (See administrative file.)

On August 4, 1960 two patents were issued bearing patent No. 121178. One patent described 400 acres of land com-

prising all of Las Vegas Nos. 1, 2, 7, 18 and 27 claims was subsequently canceled by the Bureau. A-24 n.2. The second patent issued August 4, 1960 as patent No. 121178 described only 40 acres of land comprising one-half of the Las Vegas No. 7 claim. A-24.

The agency issued another patent September 25, 1964 conveying an additional 190 acres of the land comprising parts of the Las Vegas Nos. 1, 2, 18 and 27 claims. A-24.

On October 1, 1964, the agency filed a contest complaint challenging the mineral character of the remaining 170 acres of these five claims, and the Hearing Examiner's decision of February 19, 1971, applying the agency's non-statutory administrative policy called the "ten-acre rule", and quoting extensively from the Hearing Examiner's opinion in the companion case which contested discovery on the other claims in the Las Vegas group, declared all the subdivisions to be nonmineral in character as of July 23, 1955 and dismissed the patent application as to those subdivisions. A- 41-53.

The Interior Board of Land Appeals reviewed the Hearing Examiner's decision and found on the basis of an aerial photograph that actual mining operations had been conducted on the challenged tracts in claims 1 and 2, indicating actual marketing had been conducted from those subdivisions, (A-36) that they were mineral in character and patent should be issued for them. A-40. Basis for denying patent to the remaining tracts was the petitioners' failure to meet the test that "for land to be determined to be mineral in character the rule has always included demonstration of removing and marketing at a profit." A-39.

The District Court quoted with approval the Hearing Examiner's statement of reasons for rejecting patent to the remaining ten- acre tracts. A-12 to A-14 and affirmed.

The United States Court of Appeals affirmed the administrative rejection of patent to the remaining four 10-acre tracts in Las Vegas No. 7, three 10-acre tracts in Las Vegas No. 18, and seven 10-acre tracts in Las Vegas No. 27. A-1 toA-9.

REASONS FOR GRANTING THE WRIT

There are special and important reasons why the writ should be granted. Doctor of Jurisprudence Alpheus Thomas Mason, a noted constitutional scholar, Princeton's McCormic Professor of Jurisprudence, Emeritus, warns that we are faced as a nation with our fifth constitutional crisis. This time, the clash is between mushrooming federal bureaucracy and a taxpaying electorate that resents its high costs. Princeton Alumni Weekly, January 15, 1979. President-elect Regan supported the movement in the Western States which expresses this resentment against bureaucratic control of Western lands. This movement has heen named the Sagebrush Rebellion by the press.

If allowed to stand, the decision will affect adversely the mining of all minerals, including strategic minerals in short supply. If domestic mining operations are shot down one by one, our national economy and defense will be in jeopardy.

The Supreme Court's interest in supervising the administration of justice in administrative tribunals and in the law courts should lead the Court to review the present case. The case is an important step in the maneuvering carried on for many years to rewrite the mining law by administrative interpretation and to alter long-established principles which govern the rights of citizens to occupy and purchase lands in which valuable mineral deposits are found from the way Congress provided.

Here, the Interior Department's administrative courts are attempting to extend the discovery requirement to each ten-acre subdivision of an association placer claim. The effect of the decision here would enable the Bureau of Land Management to invalidate more easily portions of the lands embraced within an association placer claim even though location of the placer claim is supported by valid discovery of a valuable mineral deposit in another portion of the same claim. The decision would get around the restrictive effect of the rule em-

bodied in the Department's own regulations 43 3842.1-1, which provides:

> "But one discovery of mineral is required to support a placer location, whether it be of 20 acres by an individual, or of 160 acres or less by an association of persons."

Here, the agency decision has excluded 14 ten-acre tracts from the patents issued for Las Vegas claims Nos. 7, 18 and 27, for the reason that those ten-acre tracts were deemed to be nonmineral in character, even though they contained substantial quantities of the same mineral of discovery (sand and gravel) which had been held adequate to justify issuance of patent to the remaining portions of the same mining claims.

The decision of the Court of Appeals affirmed the decision of the District Court for Nevada upholding the agency's exclusion of the ten-acre tracts here in question for the reason that those tracts were deemed to be non-mineral in character, even though they contained large amounts of sand and gravel of quality suitable to be processed into products for which there was a large and growing general market demand in

the Las Vegas area.

Sand and gravel was a locatable mineral when the claims were located in 1948 and in 1953, when patent application Nevada 012928.

The theory which supports exclusion from patent of portions of a placer claim which are "nonmineral in character" and cannot be shown even by geologic inference to contain the mineral of discovery, is that areas barren of the mineral of discovery should not be disposed of under the mining law. But nothing in the mining law requires that when, as here, the patent applicant has shown that the mineral deposit discovered on the claim actually extends into the challenged ten-acre tracts in substantial quantity, that the patent applicant must also prove that the general market for the mineral of discovery would absorb the mineral on these particular ten-acre subdivisions.

The IBLA decision in the present case based determination as to what portions of the claims, previously patented in part, should be added to the patented area, according to whether the agency was satisfied that actual mining had been done on the various

subdivisions prior to July 23, 1955, after which with Common Varieties Act prevented sand and gravel from being locatable. 79 I.D. at 463 A-37.

The IBLA decision argues as justification for its rejection of the tracts which are the subject of this case its contention that "for land to be determined to be mineral in character, the rule has always included demonstration of removing and marketing at a profit." 79 I.D. at 465 A-39.

This ruling contradicts the ruling of the Ninth Circuit in Barrows v. Hickel 447 F2d 80 (1971) and in Verrue v. United States, 457 F2d 1202, 1203 (9th Cir. 1972) that "Actual successful exploitation of a mining claim is not required to satisfy the prudent-man test."

In Osborne v. Hammit, 377 F Supp 977 (1964), the District Court for Nevada had required proof of actual sales in order to satisfy the marketability aspect of the discovery requirement, holding that anything less than actual sales showing production at a profit would not be credible evidence but only "speculative, hypothetical and theoretical testimony."

The IBLA decision errs by following Osborne v. Hammit, supra, and required proof of actual sales. The Board ruled:

> "We agree with the hearing examiner's conclusion that the unpatented portions of the Las Vegas Nos. 7, 18 and 27 claims are nonmineral in character because of the failure of the appellants to show that, at the time when the mineral material present on the subject lands was open to location under the mining laws, the mineral material could be mined, removed and marketed at a profit in the local market area...." A-39.

The only way demonstration can be made that mineral is marketable at a profit is by actual sales.

The agency based rejection of the contested tracts in Las Vegas claims Nos. 7, 18 and 27, in spite of proof that the patent applicants had sold large amounts of sand and gravel from the claims, and declared these tracts to be nonmineral in character not because they were barren of mineral but that they contained too much

mineral and would constitute too large reserves, more than the existing market was likely to absorb.

The Hearing examiner's decision states:

> "They (the contestees) have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years. The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948 (date of location) 1953 (date of patent application) or 1955 (date of enactment of the Common Varieties Act). Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955."

The Opinion of the court below held: "This is a proper application of the test for determining whether land is mineral in character." A-6. But this is an application of the agency policy known as the "too much" rule, which the Court of Appeals for the Ninth

Circuit recognized in Baker v. U.S. 615 F2d 224 (1980) is an impermissible modification of the mining law by administrative legislation. The Baker court said:

> The IBLA exceeded its discretionary and statutory powers when it adopted its too much or excess reserves rule. Although Congress may see fit to deal with the issue, it has never done so. The IBLA decision amounts to a legislative enactment by an executive tribunal. The IBLA possesses no such authority under our system of separation of powers.
>
> Conclusion
>
> "In sum, we hold that the IBLA's adoption of the too much rule was an abuse of discretion which was contrary to existing mining law. The result reached was arbitrary and capricious."

We agree with respondents' position in the Answering Brief filed with the Court of Appeals (p. 10) that the 10-acre mineral in character rule, as applied to mining claims, is a matter of first impression in the courts. We also agree that the so-called 10-acre rule, as applied here, is a "non-statutory administrative determination." (Ans. Br. p. 11). There is no statutory authority for the employment of

the so-called 10-acre rule here to exclude from patent land within the limits of a perfected mining claim. The agency's authority when making administrative determinations is limited to carrying out the terms of statutes enacted by Congress. Here, the agency has exceeded that authority. The Bureau should not look to the courts to enlarge agency power withheld by Congress.

The statute, 30 USC Sec 22 makes "valuable mineral deposits" "free and open to exploration and purchase and the lands in which they are found to occupation and purchase." Thus the lands in which valuable mineral deposits are admittedly found within the boundaries of the mining claim, are open to occupation and purchase, even though those lands within the boundaries of the claim are nonmineral in character.

The Bureau cannot utilize its so-called 10-acre rule to reduce the size of mining claims authorized by Congress. 30 U.S. Sec 23 (lode claims) and Secs. 35 and 36 (placers).

This court affirmed in Miller v. Chrisman, 197 U.S. 313 (1905) the decision of the California Supreme Court, 140 Cal 440, which held that if discovery is not made on each twenty acres of a 160-acre association placer mining claim, the title was not void as to such twenty acres. The California court said:

> "But a location made by an association of persons, by the very terms of the law, is one location covering one hundred and sixty acres, and not eight locations, each covering twenty acres. The boundaries required to be marked are not the boundaries of each separate twenty acres, The expenditure of five hundred dollars before patent issues is an expenditure required upon the whole land, and not an expenditure upon the twenty-acre subdivisions thereof, and the only assessment work required is labor to the value of one hundred dollars upon the single location, for the purpose of discovery, it should be treated in the same manner...."

When affirming, the United States Supreme Court did not consider it necessary to discuss the question of discovery on portions of the 160-acre claim, as it would have done if it had not agreed with the decision below on

this point.

The Bureau has equated discovery under the mining law with mineral in character as it was treated under the Homestead Act and other land laws. The Bureau asserts that all the criteria, including marketability, which are applicable to "discovery" are required to prove "mineral in character". Thus, the effect of the Bureau's contention is to require eight discoveries, one on each ten acres of a valuable mineral deposit within the boundaries of one eighty-acre mining claim.

Mr. Egan, the principal witness for the Bureau, gave his opinion that the contested portions of the claims were nonmineral. Yet he testified that on each of the 10-acre tracts to a depth of ten feet there would be something like 160,000 yards of sand and gravel. Tr 42. It could be open quarried. Tr 44. From this gravel, you could make necessary products to meet the customers' demand in that area. Tr 44. He testified that "caliche material is sand and gravel." Tr 39.

Mr. Egan attempts to support his position by testifying "It is not mineral in character on sand and gravel when there can be no market shown." Tr. 55. When asked about the market:

> "Q: Did you make any test to find out if anybody would buy it?

Mr. Egan answered: "No. It wasn't my position." Tr 44.

Thus emerges in this case of first impression in the courts a new Bureau standard of present marketability at a profit for minerals discovered on each ten-acre portion of a mining claim. This is a departure from past pronouncements of the courts.

In Verrue v. United States, a sand and gravel case, 457 F2d 1202 (9th Cir. 1972), the court said when discussing the discovery rule:

> "The most recent and authoritative enunciation of this rule is found in United States v. Coleman, 390 U.S. 599, and in Barrows v. Hickel, 447 F2d 80 (9th Cir. 1971). In Barrows, the court analyzed

> the development of the marketability and prudent man tests and determined at page 83, in regard to the 'prudent man test' that actual successful exploitation of a mining claim is not required to satisfy the 'prudent man test'." (Citing Coleman.)

In Charlestone Stone Products Co. v. Andrus, 553 F2d 1209, (9th Cir. 1977) Interior had found only one of seventeen claims located for sand and gravel to be valid. On judicial review, the District Court for Nevada held that fifteen of the rejected claims were valid. A seventeenth claim was held to be valid to utilize water recovered from a well thereon for the operation of the other valid claims. The Supreme Court in 436 U. 604 corrected the 9th Circuit's decision to make clear that water could not be regarded as a mineral discovery to support location of a mining claim, but otherwise left the decision intact.

Charlestone resembles closely the case at bar. It involved sand and gravel claims some 12 miles from the center of Las Vegas City. In each case, only one witness testified about marketability for the agency. Neither Mr. Egan here nor Mr. Fisher in Charlestone had personal knowledge of the sand and gravel market in the Las Vegas vicinity prior to the crucial date, July 23, 1955. The test of insubstantiality of the agency's evidence on marketability in Charlestone should apply here.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari be granted and the case be reviewed on the merits.

Respectfully submitted,

Dated:

January 13, 1981

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM A. McCall, SR., and the Estate of OLAF HENRY NELSON, Deceased,

Plaintiffs-Appellants,

vs.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, JOHN S. BOYLES, District Manager, Bureau of Land Management; WILLIAM J. MALENCIK, Chief, Division of Technical Services, Bureau of Land Managment; E. I. ROWLAND, State Director, Bureau of Land Management, CURT BERKLUND, Director, Bureau of Land Management, being agencies of the UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA,

Defendants-Appellees.

CA No. 78-1065 Filed July 10, 1980

OPINION

Appeal from the United States District Court for the district of Nevada

Before: HUG, & FARRIS, Circuit Judges and McNICHOLS*, District Judge:

FARRIS, Circuit Judge:

*Honorable Robert McNichols, District Judge for the Eastern District of Washingon.

In 1953, McCall and Nelson filed an application for a patent to a group of mining claims in the Las Vegas valley, asserting that the claims were valuable for mining sand and gravel. They received patents for parts of five claims, known as Las Vegas Nos. 1, 2, 7, 18 and 27. In 1964, the Interior Department filed a contest complaint alleging that the remaining portions of these claims were not mineral in character. Applying the so-called "ten-acre rule," under which each ten acres of a claim must be shown to be mineral in character, the hearing examiner found that the challenged portions of the claims were not mineral in character and dismissed the patent application as to those areas. The Interior Board of Land Appeals, acting on behalf of the Secretary of the Interior, affirmed the examiner regarding the challenged portions of Las Vegas Nos. 7, 18 and 27, but reversed his determination as it related to Las Vegas Nos. 1 and 2. The Board directed that the challenged portions of those claims be added to the patented portions. United States v. McCall, 7 IBLA 21, 79 I.D. 457, (1972). McCall and the estate of Nelson (McCall) then filed this suit in district court and a magistrate heard and recommended granting the Secretary's motion for summary judgment. The district court adopted the magistrate's findings and McCall appealed.

McCall contends that the ten-acre rule is beyond the statutory authority of the Secretary and that, even if the

rule is valid, the Board erred because it based its decision that the challenged areas were not mineral in character on the absence of actual mining on the tracts. McCall argues that absence of actual exploitation is irrelevant and that he need only show that a market existed for sand and gravel.

McCall did not raise his contention that the ten-acre rule exceeded the Secretary's authority in his opening brief. We will not ordinarily consider issues raised for the first time in a reply brief. See American Meat Institute v. Environmental Protection Agency, 526 F2d 442, 459 (7th Cir. 1975); Mississippi River Corp. v. F.T.C., 454 F2d 1083, 1093 (8th Cir. 1972). Further, McCall did not object to the magistrate's recommendation that the trial court find the rule was neither discredited, unreasonable, nor unsound in its concept. 28 U.S.C. §636(b)(1). Such a failure to bring the issue before the trial court bars McCall from raising it here. In any event, we find the contention to be without merit.

McCall's right to a patent for the claims is based on 30 U.S.C. §22 which allows citizens to purchase lands in which valuable minerals are found. 30 U.S.C. §§ 35 and 36 restrict the maximum size of a placer mining claim to twenty acres per individual, up to 160 acres for an association claim. These sections do not provide, however, that land within a placer claim that does not contain valuable minerals can be purchased under §22. The Interior

Department has held:

> Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent.

American Smelting & Refining Co., 39 L.D. 299, 301 (1910). The Department established a rule that, when challenged, the claimant must show that each ten-acre tract on his claim contains a valuable mineral. Id.; United States v. Bunkowski, 79 I.D. 43, 54-55 (1972). Since federal land is platted in ten-acre tracts, ten acres is a reasonable unit. "A court faced with a problem of statutory construction should give great deference to the interpretation of a statue by the. . . agency charged with its administration. Brubaker v. Morton, 500 F2d 200, 202 (9th Cir. 1974).

The validity of a mining claim is established either by the granting of a patent upon application by the claimant or through contest proceedings initiated by the government. See Ideal Basic Industries, Inc. v. Morton, 542 F2d 1364, 1367-68 (9th Cir. 1976). If the validity of the claim is contested, the claimant must prove that he has made a "discovery" of a valuable mineral deposit thereon. To do so, the claimant essentially must show that the mineral is "marketable" in that it can be mined, removed and disposed of at a profit. Verrue v. United States, 457 F2d 1202, 1203 (9th Cir. 1972). Only one discovery per claim must be shown. 43 C.F.R. §3842.1-1. However, if the

character of the land is also challenged in the contest complaint, the claimant must show that each ten-acre tract contains a deposit of the mineral under the ten-acre rule. The rule does not require, as McCall argues, that a discovery be made on each ten-acre tract contrary to regulation. Proof of "discovery" requires a showing of an exposed mineral deposit on the claim while "mineral in character" may be proved by geological inference coupled with market availability. California v. Rodeffer, 75 I.D. 176, 180-181. (1968)

McCall's contention that the Board based its decision on the absence of actual mining is incorrect. The Board adopted the conclusions of the hearing examiner who stated:

> It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. [The contestees] have received patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.
>
> The contestees offered no evidence to suggest that they had a market for any more than this amount of

> material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955.

This is a proper application of the test for determining whether land is mineral in character. The test is whether

> [t]he known conditions at the time of [the patent] proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

Diamond Coal and Coke Co. v. United States, 233 U.S. 236, 239-40 (1914) (concerning whether land claimed as a homestead was mineral land not subject to homestead claims". See also, United States v. Southern Pacific Co. 251 U.S. 1 (1919); Standard Oil Co. of California v. United States, 107 F2d 402 (9th Cir.), cert. denied, 309 U.S. 654 (1940); United States v. Bunkowski, supra, at 55.

McCall relies upon Verrue v. United States, supra, to support his argument that proof of an existing market is all that is necessary to prove "discovery." He argues that the same rule should apply to prove "mineral in character". Verrue holds that marketability can be shown even where there

is no proof of actual exploitation, but it does not support McCall's position. In Melluzzo v. Morton, 534 F2d 860 (9th Cir. 1976), we held that there is more to proof of marketability than proof that there was a local market. "It must appear that the local demand was able to absorb additional material . . . and still permit an attractive profit to be realized." Id. at 864. The hearing examiner's conclusion shows that McCall did not meet the proof required by this rule.

Our recent decision in Baker v. United States, 613 F2d 224 (9th Cir. 1980), is not controlling here. In Baker, the Board had refused to grant a patent for three entire claims even though it found that a valid discovery had been made on each claim. The claims were all composed of similar material. The Board invalidated two of the claims because it found that Baker had located claims in excess of the reasonably anticipated market need for the mineral (the "too much" test). We held that there was no statutory support for the Board's action. Unlike Baker, here the character of the land claimed was contested. The claims which were held invalid here were all covered by caliche material. The hearing examiner noted that it was not economically feasible to extract the type of material on these tracts since there were large deposits of easily removable sand and gravel on the other tracts.

McCall also contends that the Board's decision is not supported by substantial evidence. We disagree. The government expert, Egan, testified that he had examined the claims in 1959 and 1969 and

that the contested areas were not mineral in character because materials from them could not have been mined and marketed for a profit at the time of his examination or any time earlier. This testimony constitutes substantial evidence of a prima facie case by the government. Hallenbeck v. Kleppe, 590 F2d 852 (10th Cir. 1979). McCall presented no contrary evidence to show that a market existed in Las Vegas in 1955 in which he could have sold at a profit more sand and gravel than the amount contained in the already patented areas. Although one of McCall's experts stated that the sand and gravel from the contested areas could have been marketed at a profit, he admitted that he had not made a market study. Viewing the record as a whole, we find that the Board's decision is supported by substantial evidence. Multiple Use, Inc.v. Morton, 504 F2d 448 (9th Cir. 1974).

McCall's reliance on Charlestone Stone Products Co. v. Andrus, 553 F2d 1209 (9th Cir. 1977), rev'd on other grounds, 436 U.S. 604 (1978) is ill-founded. In Charlestone, we held that the opinion of a government examiner that the mineral on a contested claim was not marketable does not constitute substantial evidence when contradicted by direct testimony that substantial amounts of the mineral from the claim were mined and marketed at a profit. Such is not the case here. It is undisputed that the contested areas have not been mined to any significant extent. The testimony of McCall's expert is not enough to undermine the

substantiality of Egan's testimony.

Further, McCall is barred from raising this issue because he failed to object to the magistrate's recommendation that the trial court find that there was substantial evidence in the record to support the Board's decision.

Although he did not object to the motion when it was made, McCall now contends that granting the motion for summary judgment was improper because there was a substantial controversy concerning the material facts. This issue is controlled by Dredge Corp. v. Penny, 338 F2d 456 (9th Cir. 1964) where we held that summary judgment is appropriate in suits seeking review of administrative decisions even though there was conflicting evidence presented at the administrative hearing.

> A judicial determination of whether a finding of fact is supported by substantial evidence presents only an issue of law. [Citation omitted.] It is therefore subject to disposition by summary judgment.

338 F 2d at 462.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM A. McCALL, SR. and the Estate of OLAF HENRY NELSON, Deceased,

Plaintiffs-Appellants,

v.

CECIL D. ANDRUS, Secretary of the Interior of the United States of America, JOHN S. BOYLES, District Manager, Bureau of Land Management; WILLIAM J. MALENCIK, Chief, Division of Technical Services, Bureau of Land Management; E. I. Rowland, State Director, Bureau of Land Management; CURT BERKLUND, Director, Bureau of Land Management, being agencies of the UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES OF AMERICA,

Defendants-Appellees.

CA No. 78-1065

ORDER FILED October 17, 1980

Before: HUG and FARRIS, Circuit Judges, and McNICHOLS*, District Judge

*Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Farris have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a hearing en banc is rejected.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM A. McCALL, SR. et al.,

Plaintiff,

vs.

JOHN S. BOYLES, etc., et al.,

Defendant.

Civil LV-76-155, RDF

FINDINGS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

September 23, 1977

Plaintiffs seek review by this Court of a decision of the Interior Board of Land Appeals (United States v. William A. McCall, Sr., Estate of Olaf Henry Nelson, Deceased, 7 IBLA 21) of July 26, 1972, declaring null and void portions of certain sand and gravel placer mining claims in Clark County, Nevada.

On February 19, 1971, a hearing examiner declared all of the lands in issue to be nonmineral in character upon his determination that:

> The Bureau established that the contestees and their predecessors removed a limited amount of loose surface sand and gravel from the subdivisions in issue but that no attempt has been made to process or market the caliche or material

beneath the caliche capping. Prior to July 23, 1955, there were numerous unpatented mining claims in the Las Vegas valley only a few of which were in actual operation. This includes ten thousand acres of sand and gravel claims owned or controlled by Mr. McCall, one of the contestees, through his Dredge Corporation.

The contestees established that the whole valley contains sand and gravel to a depth of one thousand feet or more and that much of it can be used for the same or similar purposes. But this does not mean that the whole valley is valuable for its mineral content. It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. They have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.

The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible

> to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955. (H.E. 7)

Plaintiffs appealed to the Secretary of the Interior from the hearing examiner's decision.

In its decision of July 26, 1972, the Interior Board of Land Appeals reversed the hearing examiner's decision with respect to 30 acres of land in the Las Vegas Nos. 1 and 2 claims upon finding that such lands contained mineral material of the same nature as that found in the patented portions of the claims. (7 IBLA 35, 38)

The Board of Land Appeals affirmed the hearing examiner's decision with respect to the remaining 140 acres of the contested lands upon its determination that:

> Where the mineral character of some of the claimed land is contested although a discovery is recognized within the limits of the placer mining claim, the contestee must establish that each 10 acre tract within the entire claim is mineral in character * * *; and
>
> * * * (T)he unpatented portions of the Las Vegas Nos. 7, 18 and 27 claims are nonmineral in character because of the failure of the appellants to show that, at the time when the mineral material present on the subject lands was open to location under the mining laws, the mineral material could be mined,

> removed and marketed at a profit in the local market area. The mineral material on these 10-acre tracts was not of as high a quality as that which was being mined, removed and marketed at a profit from the now patented portions of these claims. (7 IBLA 27, 37.)

The decision of the Interior Board of Land Appeals of July 26, 1972, constitutes final administrative action in this matter.

The sole issue raised by plaintiffs is as to the propriety of subjecting plaintiffs' mining claims to the requirement that each 10-acre subdivision be shown to be mineral in character.

The 10-acre rule is not based upon any statute. It is the position of the Government that the 10-acre rule is based upon departmental determination. The statement of the rule originated in American Smelting and Refining Company, 39 L.D. 299 (1910), wherein responding to an argument that 20 acres should be the unit of investigation and elimination, the Secretary said at Pages 301-302:

> It is elementary that only mineral lands are subject to disposition under the mining laws. * * * * * *The statute, mining regulations and decisions clearly contemplate that a placer location may be made of a 10-acre tract in square form. If such a tract,

> whether in a location by itself or included with other such tracts in a maximum location, is proven to be nonplacer ground, such tract can not pass to entry and patent under the placer application.
>
> * * * The ground containing the placer mineral deposit is the subject of the placer location. A single placer discovery does not impress the entire area that may be embraced within the location with a placer character, if it be shown as a matter of fact that a definite portion thereof is nonplacer. (39 L.D. at 301-302.)

The so-called "10-acre rule" has been consistently employed since its adoption in 1910, and it appears that this is the first time the validity of the rule has been raised before any Court.

". . .the construction given to a law or regulation by those responsible for carrying it out is entitled to great weight and ought not to be overruled without good reasons and unless plainly erroneous." Barrington Manor Apartments Corporation v. United States, 459 F2d 499, 502-503 (C.C.s. 1972) See also Udall v. Tallman, 380 U.S. 1, 16 (1965), rehearing denied, 380 U.S. 989.

Plaintiffs in questioning the validity of the 10-acre rule rely upon a statement in 1 American Law of Mining, Section 4.92, to the effect that:

> * * * (S)ince the sole justification for using a 10-acre tract as

> the pertinent unit is that it is a subdivision of the public lands, to utilize a 10-acre tract which is not a subdivision of the public lands casts doubt on the validity of the rule itself.

Plaintiffs have relied extensively on the second edition of "1 Lindley on Mines, 781 Sec. 438" which predates the American Smelting and Refining case which is the origin of the 10-acre rule. The same section of the third edition of that publication, which postdates the 10-acre rule, states as follows:

> Some of the earlier decisions of the land department held that a discovery on each twenty acres of an association placer location was essential in order to hold the entire area. But the rule is now well settled both by the courts and the land department that one discovery within the limits of an association location is sufficient. The land department, however, while recognizing this rule, takes the position that a single discovery within a placer location does not conclusively establish the mineral character of all the land within it, and that this question is open to investigation by the department at any time until patent has issued. There is no legal inference that because a given twenty acre tract within an area of one hundred and sixty acres is mineral in character, the adjoining tracts or others are of the same character.

> In determining the character of the land embraced in a placer location, ten-acre tracts normally in square form are the units of investigation and determination, and if any such are found to be nonmineral, they should be eliminated from the claim. * * * (2 Lindley Mines (3d ed. 1914) sec. 438, pp. 1029-1030; emphasis added.)

Plaintiffs have not shown the employment of a discredited test in the adjudication of their claims.

Plaintiffs have failed to show that any other rule should be applied or that the 10-acre rule is unreasonable or unsound in its concept.

There are no defects in the agency proceedings which amount to any deprivation of due process.

There is substantial evidence in the record to support the ultimate decision of the agency.

The findings and recommendations herein shall constitute the findings of fact and conclusions of law.

The parties hereto have ten days from the date of entry of these findings of fact and recommendation to file with the Clerk of the Court, and serve upon counsel for the opposing party, written objections with points and authorities to any of the Magistrate's findings of fact and recommendation. The other party shall respond to any such objections within an additional ten days.

RECOMMENDATION

It is, therefore, the recommendation of the United States Magistrate that the judgment in favor of the defendant be entered accordingly.

DATED this 22 day of September, 1977.

/s/ Joseph L. Ward
United States Magistrate

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM A. McCALL, SR., et al.,

Plaintiff,

vs.

JOHN S. BOYLES, etc., et al.,

Defendant.

Civil LV-76-155, RDF

JUDGMENT Nov. 4, 1977

This matter having come before the Court on defendants' motion for summary judgment, and the Court having considered the pleadings and all material filed in support of the motion, and after review of the Findings and Recommendation of the United States Magistrate, it appearing that there is no genuine issue as to a material fact, that the Secretary's decision was not arbitrary or capricious

or othevwise contrary to law that it is supported by substantial evidence, and that defendants are entitled to judgment as a matter of law,

IT IS ORDERED AND ADJUDGED as follows:

1. The Findings and Recommendation are approved and constitute the findings of fact and conclusions of law.

2. Defendants' motion for summary judgment is granted.

3. The action is dismissed on the merits, and all relief sought by plaintiff is denied.

Dated this 4th day of November, 1977.

/s/ Rober D. Foley
United States District Judge

UNITED STATES

v.

WILLIAM A. McCALL, SR.,
ESTATE OF OLAF HENRY NELSON,
DECEASED

7 IBLA 21

Decided July 26, 1972

Appeal from decision of Hearing Examiner Graydon E. Holt declaring certain 10-acre subdivisions within several placer mining claims nonmineral in character as of July 23, 1955, and rejecting mineral patent application therefor, Nevada Contest 012928.

Affirmed in part; reversed in part.

Mineral Lands: Determination of Character of--Mining Claims: Common Varieties of Minerals; Generally -- Mining Claims: Patent

Where (1) an association placer mining claim embracing 80 acres was located for a common variety sand and gravel prior to July 23, 1955 (2) the sand and gravel was mined, removed and marketed at a profit from a portion of the claim before July 23, 1955 (3) a mineral patent has been issued for some of the 10-acre subdivisions of the claim, and (4) the mineral material deposits on the unpatented portion of the claim are similar in nature to the mineral found on the patented portion of the claim, which deposits had been mined, removed and marketed at a profit prior to July 23, 1955, and thereafter,

it is error to hold such unpatented 10-acre subdivisions within the claim to be nonmineral in character and to reject a mineral patent application therefor.

Mineral Lands: Determination of Character of--Mining Claims: Common Varieties of Minerals; Generally-- Mining Claims : Patent

Where mineral material on some 10-acre subdivisions within an association placer mining claim embracing 80 acres is not of as high a quality as the mineral which was being mined, removed and marketed at a profit on July 23, 1955, from now patented portions of the claim, it is proper to hold that such unpatented 10-acre subdivisions within the claim are nonmineral in character and to reject a mineral patent application therefor.

Mineral Lands: Generally--Mining Claims: Discovery: Generally

A single discovery of a valuable mineral deposit is sufficient to validate an association placer mining claim embracing 80 acres, and each 10-acre subdivision within the claim is properly determined to be mineral in character where the mineral material present is of a homogeneous nature throughout the entire 80 acre claim.

APPEARANCES: George W. Nilsson, Esq., Monta W. Shirley, Esq., of Counsel, for the Appellants. Otto Aho, Esq., Field Solicitor, U.S. Department of the Interior, for the United States.

OPINION BY MR. HENRIQUES

INTERIOR BOARD OF LAND APPEALS

This is an appeal to the Secretary of the Interior from a decision of a hearing examiner dated February 19, 1971, holding that the land in certain 10-acre subdivisions is nonmineral in character, and rejecting mineral patent application Nevada 012928 for such lands.

Mineral patent application Nevada 012928, filed March 27, 1952, by William A. McCall, Sr., and Olaf Henry Nelson, included the Las Vegas Nos. 1 through 23, and 25 through 27 placer mining claims, situated in sections 15, 22, 27, 28 and 29, T. 20 S., R. 60 E., M.D.M., Clark County, Nevada. 1/ The land of-

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1/ The claims are adjacent to the boundaries of the city of Las Vegas, Nevada, and lie approximately 6 miles westerly from the Clark County Courthouse in the center of Las Vegas. The claims were located by Vernon D. Bradly, John W. Bonner, N. C. Bradley and G. C. Bradley on March 30, 1948. Each claim contained 80 acres, for a total of 2,080 acres in the 26 claims. The four locators conveyed the group of claims to Olaf H. Nelson, on June 1, 1948, and he, in turn, conveyed a one-half interest in the group to William A. McCall, Sr., on September 24, 1952.

fice manager issued a certificate October 8, 1954, naming all 26 claims. Patent 121178 was issued thereafter on August 4, 1960, for 40 acres described as SW1/4 NE1/4 section 22, T. 20 S., R. 60 E., within Las Vegas No. 7 claim. 2/ Patent 27-65-0095 was issued September 25, 1964, for 190 acres described as SE1/4SE1/4, S1/2NE1/4SE1/4, NE1/4NE1/4 SE1/4 section 22 (within Las Vegas No. 1); SE1/4NE1/4, E1/2NE1/4NE1/4 section 22 (in Las Vegas No. 2), S1/2S1/2NW1/4, NE1/4SE1/4NW1/4 section 27 (in Las Vegas No. 18), and SE1/4NE1/4NW1/4 section 27 (in Las Vegas No. 27) all in T. 20 S., R. 60 E.

A complaint issued October 1, 1964, by the acting manager, Nevada land office, Bureau of Land Management, alleged that the remaining 170 acres within the Las Vegas Nos. 1, 2, 7, 18 and 27 placer mining claims were nonmineral in character.3/

Following denial of the allegation, a hearing was held September 30, 1969, at Las Vegas. After hearing

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2/ A patent, numbered 121178, inadvertently was issued on August 4, 1960, for 500 acres, being all the land in the Las Vegas Nos. 1, 2, 7, 18 and 27 claims. This patent was canceled March 4, 1964, by the United States District Court for the District of Nevada in Civil Case No. 471.

3/ Las Vegas No. 1: NW1/4NE1/4SE 1/4 section 22; Las Vegas No. 2: W1/2

testimony and taking evidence, the hearing examiner held that the said land is nonmineral in character and rejected the mineral patent application therefor. This appeal followed.

The Appellants make the following assertions:

1. The decision of the hearing examiner was in error because all of the lands covered by each of the placer mining claims in question are mineral in character, mineral having been discovered and removed from each of the claims and from land adjacent thereto.

2. The decision of the hearing examiner was in error because it attmpts ot make laws, which is in violation of the Constitution which states the Congress shall make the laws, and denies the appellants due process of law.

3. The decision of the hearing examiner was in error because it was contrary to the evidence.

4. The decision of the hearing examiner requiring that there

NE1/4NE1/4 section 22; Las Vegas No. 7; NW1/4NE1/4 section 22; Las Vegas No. 18: N1/2SW1/4NW1/4, NW1/4 SE1/4NW1/4 section 27; Las Vegas No. 18: N1/2SW1/4NW1/4, NW1/4SE1/4NWk/4 section 27; Las Vegas No. 27: N1/2NE1/4NW1/4, SW1/4NE1/4NW1/4, NW1/4NW1/4 section 27; all in T. 20 S., R. 60 E., M.D.M.

be a market for sand and gravel on certain fixed dates is unconstitutional, illegal, and void.

5. The decision of the hearing examiner was in error because the requirement of "Marketability at a Profit" supplements the "Prudent man Rule" and therefore should have been published in the Federal Register, and also because it is vague and merely based on the opinion of the Department Solicitor.

Although mining claims on public land cannot be struck down arbitrarily, the Government has the power, so long as it holds legal title to the land and after proper notice and upon adequate hearing, to determine whether the land is mineral in character and the claim valid, and if the land is found to be nonmineral in character or the claim invalid to declare it null and void. See Best, et al. v. Humboldt Placer Mining Company, et al., 371 U.S. 334 (1963); Standard Oil of California, et al. v. United States, 107 F2d 402 (9th Cir. 1939), cert. denied 309 U.S. 654 (1940).

Prior to consideration of the appellants' contentions of error, it is proper to note here that the Department has ample authority to refuse to issue a patent for mining claims and to order further proceedings at any time before patent issues to determine whether the

requirement essential to establishing the validity of the mining claim have been met. United States v. H. B. Webb, 1 IBLA 67 (October 15, 1970); United States v. Eleanor A. Gray et al., A-28710 (Supp. II) (April 6, 1965); United States v. United States Borax Company, 58 L.D. 426 (1943).

A single discovery of mineral sufficient to authorize the location of a placer claim does not conclusively establish the mineral character of all the land included in the claim, and the question as to the character of the land is open for investigation and determination by the land department at any time until patent has issued. American Smelting and Refining Company, 39 L.D. 299 (1910).

To establish the mineral character of lands it must be shown that the known conditions are such as to engender the belief that the lands contain mineral of such quality and quantity as to render its extraction profitable and justify expenditure to that end; the mineral character may be established by inference without the exposure of the mineral deposit for which the land is supposed to be valuable. United States v. Henrietta Bunkowski and Andrew Julius Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972).

The evidentiary weight to be attached to the actual discovery or disclosure of placer mineral upon one portion of a 160 acre placer claim is dependent upon the character of the deposit and

and formation, the surrounding geologic conditions, and all the facts and circumstances of the particular case. Crystal Marble Quarries Company v. Dantice, et al., 41 L.D. 642 (1913).

Where the mineral character of some of the claimed land is contested although a discovery is recognized within the limits of the placer mining claim, the contestee must establish that each 10-acre tract within the entire claim is mineral in character. If the contestee fails to establish the mineral character of any 10-acre tract, that tract is properly excluded from the patent application. Id; American Smelting and Refining Company, supra.

We turn now to appellants' first three contentions of error, which are intertwined and will be considered together. It is elementary that the terms "mineral" and "mineral in character" are not synonymous. "Mineral" is generally defined as an inorganic substance occurring in nature, though not necessarily of inorganic origin, which has (1) a definite chemical composition, and (2) distinctive physical properties or molecular structure. A Dictionary of Mining and Mineral Related Terms, U.S. Bureau of Mines (1968).

> The mineral character of the land is established when it is shown to have upon or within it such a substance as--
> (a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or--

> (b) Is classified as a mineral product in trade or commerce; or
>
> (c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;
>
> And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it. Lindley on Mines §98. Cited with approbation in Layman v. Ellis, 52 L. D. 714 (1929).

The mineral character of land may be established by inference without actual exposure of the mineral deposit for which the land is supposed to be valuable, but the inferred existence of a deposit of common variety sand and gravel at unknown depth beneath a dense caliche at the surface does not establish the mineral character of the land in the absence of evidence that extraction of the sand and gravel was economically feasible before July 23, 1955, thereby giving the land a practical value for mining purposes. Cf. State of California v. E. O. Rodeffer, 75 I.D. 176 (1968).

A discovery exists:

> (W)here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * * Castle v. Womble, 19 L. D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed,and presently marketed at a profit, the so-called marketability test. United States v. Coleman, supra. This present marketability can be demonstrated by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. The marketability test has been specifically held to be applicable in determining the validity of sand and gravel claims in the Las Vegas area. Palmer v. Dredge Corporation,398 F2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F2d 836 (D.C. Cir. 1959); Osborne v. Hammit, Civil No. 414, D. Nev. (August 19, 1964).

A succinct discussion on marketability was given recently by the Court in Alfred N. Verrue v. United States, 457 F2d 1202, 1203 (9th Cir. 1972):

> The criteria of marketability for sand and gravel claims was clearly announced in Foster v.

Seaton, 106 U.s. App. D. C. 253, 271 F2d 836, 838 (1959) wherein the court stated:

"***'a mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.'."

The most recent and authoritative enunciation of this rule is found in United States v. Coleman, 390 U.S. 599, 88 S. Ct. 1327, 20L Ed. 2d 170 (1968) and in Barrows v. Hickel, 447 F2d 80 (9th Cir. 1971). In Barrows, the court analyzed the the development of the marketability and prudent-man tests and determined at p. 82 in regard to the prudent-man test", that:

"Actual successful exploitation of a mining claim is not required to satisfy the 'prudent-man test." (citing Coleman, supra.)

and at p. 83, in regard to the "marketability test" that"

"The 'marketability test' requires claimed materials to posess value as of the time of their discovery. Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. What is required is that there be, at the time of discovery, a market for the

> discovered material that is sufficiently profitable to attract the efforts of a person of ordinary prudence." (Italics in original.)

A patent for a mining claim is an adjudication by the land department and a conveyance of title to the land which the patent describes and raises a presumption of right and regularity in all the proceedings antedating it. United States v. Beaman, et al., 242 F 876 (8th Cir. 1917). So the action taken by the land office to issue patents for some land in each of the five claims herein contested is prima facie evidence of a discovery under the mining laws and of the mineral character of the lands described in the patents.

The question before the hearing examiner was whether the specific nature of the sand and gravel material on each 10-acre subdivision named in the contest complaint was such as to engender a determination that the land was mineral in character within the comprehensive definition followed by the Department for the past century.

There is no controversy as to the general geology of the area surrounding the contested claims. They are in the valley fill, near Las Vegas, with a very slight slope generally toward the east. The mineral material present is limestone dolomite, eroded and washed down from the higher mountains to the west. This mineral material in easily recoverable form exists over many

square miles of Las Vegas Valley. Evaporation of ground water has deposited the suspended calcium carbonate as a cementing agent, building a caliche-type conglomerate of varying thicknesses and hardnesses throughout the area. Action by sporadic run-off water has dissolved or weakened the cementation in and along some of the water courses, which, together with wind action, has made small deposits of loose sand and gravel. There are numerous sand and gravel operators active in the Las Vegas area at this time, and there have been many for the past thirty years, with the operations being conducted on widely dispersed tracts, including the patented portions of the five claims involved in this proceeding.

What did the government present in support of its charge that the subject lands are nonmineral in character?

W. J. Egan, a mining engineer employed by the Bureau of Land Management, testified as an expert witness of the government. He made the following statements relative to each of the 10-acre subdivisions herein involved:

Q. What was your determination regarding the mineral character of the contested portion of the claims in question?

A. My determination was: that the land that each of these ten acre tracts was non mineral in character at that time (sic)

Q. Please state, in detail the basis of your determinaticn.

A. I traversed each of those ten acre tracts by foot. I observed the condition of the ground relating to all the factors that go to determine the mineral character of a sand and gravel deposit. I made notes, observed the amount of material that was loose, or the amount of fines and low (sic) sand that was on the area. On the Las Vegas No. 1, this tract here, which would be described by legal subdivisions, as being in the northwest of the northeast of the southeast of section 22, range 6, township 20 south, range 60 east. The areas traversed by two small arroyos and, to the east, the sand and gravel had already been removed and there had been some pushing around of material on the extreme eastern edge.

Further to the west, the material is all covered with a small thickness of a small portion of surface gravel then a large portion of blow sand. Further to the west, you will get into outcroppings of hard caliche. On the Las Vegas No. 2, which would be described legally by the two ten acre tracts would be the northwest of the northeast of the northeast and southwest of the northeast of the northeast, sect'on 22, township 20 south, range 60 east. There again, you have a surface mantle of blow sand with small amounts of gravel. Then, as you proceed westward, the surface mantle tends to thin out and you have outcroppings of hard caliche and it is also evidenced in the arroyo that runs in the eastward direction and it's probably

about two feet deep. In the bottom of that arroyo is clear, visible, pronounced hardpan caliche. As you proceed westward, the same condition prevails in the Las Vegas No. 7, section 22, township 20 south, range 60 east and can be described legally as the ten acre tracts comprising the north half of the Las Vegas 7, or as the northwest quarter of the northeast quarter forty acres. The surface mantle in this instance, in this portion of the area, is much thinner than it is further to the east. As you approach the western end of the claim, the caliche outcrops all over and there is little or no surface mantle in the area at all. On the Las Vegas 27, as shown on the previous discussed exhibits and photographs, the entire area is almost exclusively devoid of any surface mantle and caliche is hard.

The same applies to the portion of Las Vegas 18, which is three ten acre tracts and can be described legally as the northwest of the northwest and as the northeast of the southwest of the northwest and as the northwest of the southeast of the northwest, section 27, township 20 south range 60 east. Based on the observations and conditions that prevail as to the condition of the type of ground and the difficulty that the bulldozer had in riping (sic)-- I might add that the bulldozer averaged somewhere around forty minutes to make each one of these passes. In some instances, he was as much as two hours. Of course, there were some minor ones that were less than that. I think the shortest one was fifteen minutes in which he was able to push up maybe

twenty yards of material. In my opinion are (sic) the observations and the other conditions prevailing in that area. I made the determination that the land was nonmineral in character as of that date and prior to that time, since there wasn't mineral in character (sic), it had to be nonmineral and it was non mineral in character during the preceding years, also. The operations that were existing in the Las Vegas 18 had discontinued mining sometime in 1956 and they had made no attempt, at that time, to move elsewhere. There was markets (sic) in the area, but it is that this material could not compete at an economical rate with other producers.

Q. You stated that your last review or examination was September 29, 1969; is that correct?

A. Yes, sir.

Q. Was it your opinion, as of that date, that all the lands involved in this proceeding is nonmineral in character?

A. Yes. (Transcript 34-37).

Exhibit 11, an aerial photograph taken October 4, 1963, depicts areas of operation within the Las Vegas Nos. 1, 2, 7, 18 and 27 claims. The extent of mining operations on these claims is clearly discernible. The picture shows indications of mining in the NW1/4NE1/4SE1/4 section 22, within the Las Vegas No. 1, and in the W1/2NE1/4NE1/4 section 22, within Las Vegas No. 2, as extensions

of operations in the adjoining patented portions of these claims. Regardless of his ultimate conclusions, the testimony by Egan does not contradict the visual evidence on the photograph. Similarly, witnesses for McCall testified that sand and gravel was present on the surface of these three 10-acre subdivisions, albeit the loose surface material was slightly thinner than on the patented portion of the Las Vegas Nos. 1 and 2 claims. We are of the opinion, therefore, that the testimony and evidence support a determination that the unpatented 20 acres in the Las Vegas No. 2 claim are mineral in character, since the sand and gravel was mined from these three 10-acre tracts and they contained mineral material of the same nature as that found in the portions of the claims now patented.

The testimony of Egan indicates that the unpatented portions of Las Vegas Nos. 7, 18 and 27 claims are covered by a thin mantle of sand and gravel overlying a dense caliche. The aerial photograph does not show anything to the contrary. There is indication of scraping of loose surface materials in parts of Las Vegas No. 18, but no indication of any excavating in any of the unpatented portions of these three claims. The witnesses for McCall gave testimony that the buried material on the unpatented portions of these three claims was inferentially of the same character as the material under the patented portions of these claims and of other patented claims adjacent, but they admitted there were less exposed

loose material on the surface of the unpatented portions. Egan conceded that in depth the deposits in the unpatented portions were probably similar to those in the patented lands but asserted that the unpatented tracts could not be mined and the extracted material processed economically in competition with other producers in the Las Vegas area as of 1955. The appellants did not offer any substantive rebuttal to this testimony. McCall testified as to past production from all five claims, with no definite figures for any one claim. He indicated that although his partner, O. H. Nelson, had been active as a contractor, prior to his retirement in 1951, and had mined large quantities of sand and gravel from all his claims, he, McCall had a policy not to attempt to operate a sand and gravel business but rather to license contractors or others to take material from the claims and pay him a royalty. He stated that he had charged a royalty of 5 cents a yard prior to 1954, at which time he raised the rate to 10 cents. In 1966 he effected a further raise of 15 cents a yard.

The testimony indicates that prior to July 23, 1955, sand and gravel operations in Las Vegas Valley were largely limited to surface deposits because they were loose, most easily loaded and economical to mine. The caliche was not competetive in the market, even though it could be processed into the same kinds of material, due to the greater expenses entailed because of heavier equipment needed to rip the material or because

of the need to drill and blast to break the rock. The excess costs for working the caliche were estimated to amount to 35 cents a yard.

We agree with the hearing examiner's conclusion that the unpatented portions of the Las Vegas Nos. 7, 18, and 27 claims are nonmineral in character because of the failure of the appellants to show that, at the time when the mineral material present on the subject lands was open to location under the mining laws, the mineral material could be mined, removed and marketed at a profit in the local market area. The mineral on these 10-acre tracts was not of as high a quality as that which was being mined, removed and marketed at a profit from the now patented portions of these claims.

We turn now to the contentions of the appellants relating to marketability. In connection with discovery, satisfaction of the test of marketability as a proper complement to the prudent man rule is well established. United States v. Coleman, supra; United States v. Barrows et al., 404 F2d 749 (9th Cir. 1968), cert. denied, 394 U.S. 974 (1969). Application of the marketability test to a determination of validity of sand and gravel claims in the Las Vegas area has been sustained repeatedly. Palmer v. Dredge Corporation, supra; Foster v. Seaton, supra; Osborne v. Hammit, supra. As has been shown above, for land to be determined to be mineral in character the rule has always included demonstration of removing and marketing at a profit. See Lindley

on Mines, supra. We dismiss the contentions as being without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the hearing examiner's decision is affirmed as to the contested lands within the Las Vegas Nos. 7, 18 and 27 placer mining cla'ms, and is reversed as to NW1/4NE1/4 SE1/4 section 22 (within Las Vegas No. 1 claim) and to W1/2NE1/4NE1/4 section 22 (within Las Vegas No. 2 claim), which are herein determined to be mineral in character and for which mineral patent may be issued in response to application Nevada 012928. The case is remanded to the Bureau of Land Management for appropriate action consistent herewith.

DOUGLAS E. HENRIQUES,
Member.

We concur:

EDWARD W. STUEBING, Member

NEWTON FRISHBERG, Chairman

UNITED STATES DEPARTMENT
OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
Hearings Division
Room W-2426, 2800 Cottage Way
Sacramento, California 95825

DECISION February 19, 1971

United States of America, Contestant,	:	Contest No. N-012928
v.	:	Involving Las Vegas Nos. 1, 2, 7, 18 and 27 placer mining claims located in Secs. 22 and 27, T. 20 S., R. 60 E. M.D.M. Clark County, Nevada
Wm. A. McCall, Sr., and Olaf Henry Nelson, Jr., Contestees.	:	

Statement of the Case

The Bureau of Land Management initiated this proceeding through the filing of a complaint in the Land Office at Las Vegas, Nevada, on October 1, 1964. In the complaint the Bureau charged that the land within the following subdivisions of Township 20 South, Range 60 East, M.D.M. is nonmineral in character:

Las Vegas No. 1 - NW-1/4 NE-1/4 SE1/4-Sec. 22
Las Vegas No. 2 - W-1/2 NE-1/4 NE-1/4 - Sec. 22
Las Vegas No. 7 - NW-1/4 NE-1/4 Sec. 22
Las Vegas No. 18 - N-1/2 SW-1/4 NW-1/4; NW-1/4 SE-1/4 NW-1/4- Sec. 27

Las Vegas No. 27 - N-1/2 NE-1/4 NW1/4; SW-1/4 NE-1/4 NE-1/4; NW-1/4 NW-1/4 Sec. 27

The contestees filed a timely answer denying this allegation.

Previously the contestees had applied for a patent for the Las Vegas Nos. 1 through 27 placer mining claims. The claims were all located for sand and gravel on March 20, 1948, by V. D. Bradley and three others and each contains 80 acres for a total of 2160 acres. Mr. Bradley and his associates conveyed the claims to Olaf H. Nelson on June 1, 1948, and he conveyed a one-half interest to William A. McCall, Sr. on September 24, 1952. The subdivisions embraced by all of the claims were withdrawn from mineral entry by classification number 95, dated October 2, 1953 (Ex 5), and common varieties of sand and gravel were excluded from location by section 3 of the act of July 23, 1955, 30U.S.C. Sec. 611 (1964).

All of the claims, except for the 5 claims involved here, were contested by the Bureau on the ground that the land was nonmineral and that there had not been a timely discovery of a valuable mineral deposit. Nevada Contests Nos. 3092-3095, 3097-3106, 3108-3113, and 3224. A Hearing Examiner, by decision dated August 15, 1968, found that the material on the claims was a common variety of sand and gravel and that no market for it had been developed by July 23, 1955. Accordingly,

the claims were held to be null and void for the lack of a timely discovery. This decision is now before the Board of Land Appeals. Of the group of claims presently in issue the Bureau issued patents to the contestees for 70 acres in Las Vegas No. 1; 60 acres in Las Vegas No. 2; 40 acres in Las Vegas No. 7; 50 acres in Las Vegas No. 18; and 10 acres in Las Vegas No. 27.

Applicable Law

The mining law reserves "lands valuable for minerals" for occupation and location of "valuable mineral deposits" on lands belonging to the United States, but "no location of a mining claim shall be made until the discovery" of a valuable deposit. Placer claims are subject to entry and patent upon proceedings similar to lode claims but "no such location shall include more than twenty acres for each individual claimant," and "no location of a placer claim, made after the 9th day of July 1870, shall exceed one hundred and sixty acres: for an association of persons, 30 U.S.C. Secs. 21, 22, 35 and 36 (1964). One discovery of a valuable deposit is a sufficient basis for an association placer claim of 160 acres but each 10-acre subdivision must contain valuable minerals and those subdivisions that are not mineral in character must be excluded from the entry. United States v. Eleanor A. Gray, et al., A-28710 (May 18, 1962); United States v. John R. and Pearl E. Dodson, A-27905 (July 31, A-27905 (July 31, 1959), A-27905 (Supp.) (October 15, 1959; Crystal Marble

Quarries Co. v. Dantice, et al., 41 L. D. 642 (1913).

Although an association claim of more than 20 acres may be conveyed to one individual, the claim must be valid and each subdivision must be mineral in character as of the date of the conveyance. The claim must also be valid and each subdivision mineral in character as of the date the land is withdrawn from location or the mineral material is excluded from location. Cole v. Ralph, 252 U.S. at 297-98 (1919); Cameron v. United States, 25 2 U.S. at 456, Palmer v. The Dredge Corp., 398 F2d 791 (1968); Converse v. Udall, 399 F2d 616 (1968). Since the claims in issue were conveyed to Mr.Nelson by an association of locators on March 20, 1948, he was entitled to only 20 acres for each claim, unless the remaining subdivisions were mineral in character as of that date. All of the land within the claims had to be mineral in character on the date the land was withdrawn from mineral location, October 2, 1953, and if the sand and gravel is a common variety of material, each subdivision had to be mineral in character as of the date such material was excluded from location, July 23, 1955. In the recent case of United States v. Clare Williamson, 75 I.D. 338 (1968) the Government contested a part of a placer claim on the ground that it was nonmineral in character. The claim was located July 2, 1945, for pumice on land which was withdrawn from mining location on December 21, 1945. The test for making the determination was given at page 344 as follows:

"The test is that in order to establish the mineral character of land it must be shown that known conditions on the critical date (in this case December 21, 1945) were such as reasonably to engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. If they were not, the lands were not then known to be mineral in character and were not excepted from the effect of a withdrawal removing them from operation of the mining laws. See Diamond Coal and Coke Co. v. United States, 233 U. S. 236 (1914); United States v. Southern Pacific Company et al., 251 U.S. 1 (1919); United States v. State of California et al., 55 I.D. 121 (1935); Southern Pacific Company, 71 I.D. 224 (1964).

"The relationship of the issues of mineral discovery to that of the mineral or nonmineral character of land was recently discussed in State of California v. E. O. Rodeffer, 75 I.D. 176 (1968). In that case we pointed out that the test of discovery and that for determining the mineral character of land are very similar but are not identical, and, while the issue of that case was substantially different from that involved here, the discussion of the relationship of the tests in that case is pertinent now.

"As we noted there, the accepted standard for proof of a discovery is whether minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. The most obvious difference between the two tests, we pointed out, lies in the fact that a discovery can be demonstrated only by the physical exposure, within the limits of a claim, of the mineral deposit on account of which the land is alleged to be valuable, whereas the mineral character of land may be determined from geologic inference or from other less conclusive evidence than is required to demonstrate a discovery. Beyond this difference in the degree of proof required to show the presence of a mineral deposit, there is little, if any, substantive difference in the two tests. That which is to be determined in either case is whether or not exploitation of the minerals is believed to be economically feasible. A review of early cases reveals that in many instances an identical test was employed whether the issue was discovery or mineral character. See, e.g., John Downs, 7 L.D. 71 (1888); Walker v. Southern Pacific R. R. Co., 24 L.D. 172 1897); Cataract Gold Mining Co. et al., 43 L.D. 248 (1914), and cases cited.

> "Where the mineral character of land is in issue, however, it may not be sufficient merely to show that the land is mineral in character at the present time. As we have already indicated, if the land has been withdrawn or otherwise closed to mining location, it must be shown that the facts establishing mineral character were known to exist prior to the effective date of the withdrawal of the land from the operation of the mining laws. Of course, failure to establish the mineral character of land embraced in a placer claim at the time of the filing of a patent application would in any event preclude issuance of patent. However, a showing that the land is presently mineral in character would be insufficient to except the land from the effect of the withdrawal if it could not be established that the land was known to be mineral in character at the date of the withdrawal. Cf. Southern Pacific Company, supra, at 228-229. In other words, so far as this case is concerned, appellant must show that she would have prevailed in an inquiry into the mineral character of the land had it been made in 1945."

After the Bureau has made a prima facie case, the burden is on the contestees to affirmatively establish by a preponderance of the evidence that the subdivisions were mineral in character. Foster v. Seaton, 271 F2d 836 (1959).

Summary of Testimony

The five claims are in the Las Vegas valley approximately seven miles northwest of the center of Las Vegas. The land is flat with a slight eastward slope. The entire valley is an alluvial fill from material eroded from the surrounding mountains. The material is essentially the same for many square miles and has been estimated to be 1000 feet or more in depth. Because the material has no special use or value, it must be considered a common variety not subject to location after July 23, 1955. In the material there is calcium carbonate which in many places has cemented to a caliche or hard pan. The caliche has been identified on each of the contested 10-acre tracts. The major differences in the testimony of the witnesses was over the question of whether deposits of sand and gravel with a covering of caliche can be mined economically in competition with other deposits in the area.

Mr. W. J. Egan, a mining engineer employed by the Bureau, testified that he was on the claims in 1959 and again in 1969. On each of the contested subdivisions he found caliche exposed to a depth of from 12 to 15 feet (Tr. 32). The caliche is covered by blow sand in the washes and it is this material that the contestees have mined on the patented land (Tr 52). Mr. Egan expressed the opinion that the material with the caliche could not be mined in competition with existing deposits of sand and gravel (Tr.29). In discussing the volume of the material on the patented land he stated that for each 10 feet of depth

on a 10-acre tract there are one hundred and sixty thousand cubic yards of material. (Tr 43). There is a producing mine three or four miles away referred to as the Wells-Cargo mine which is covered by a loosely cemented caliche. This material is blasted at a cost of 35 cents a yard.

Mr. E. J. Mayhew and Mr. Robert McMillan, consulting geologists, testified on behalf of the contestees. After describing the geology of the area Mr. Mayhew testified that the caliche on the claims is not very thick (Tr 64), that in two blasted pits near claim 27 it is about one foot thick with very good sand beneath, and that in another pit nearby it is two feet thick. He believes that heavy equipment would have no trouble ripping this material apart. The caliche can then be processed along with the loose material (Tr. 65). Also he testified that the contested subdivisions are the same as the patented land. (Tr 67). Mr. Mayhew concluded with the opinion that the entire valley is mineral in character (Tr 73). Mr. McMillan agreed with Mr. Mayhew and in addition stated that the sand and gravel is at least one thousand feet deep (Tr 79). The caliche he saw was from four to ten feet thick. (Tr 76).

Mr. William A. McCall, Sr., testified that both V. D. Bradley, one of the originallocators, and Olaf Nelson were construction contractors. Shortly after Mr. Nelson acquired the claims he began the operation of a sand and gravel plant on claims 18 and 27 but later sold his plant to a firm which continued operations until 1951. (Tr

83). Mr. McCall acquired his half interest in 1952. After this date a number of contractors purchased materials from the claims. In 1952 Ideal Asphalt Co. removed eighty thousand tons from claims 1 and 7. Wells Stewart followed and mined on claim 7 for 18 months starting in 1955 or 1956 (Tr 85). In more recent years smaller amounts have been removed. (Tr 86).

The Hearing Examiner in his decision of August 15, 1968, on the previous case made the following comments:

"Mr. Vernon D. Bradley, the locator, testified that in 1948 he needed a reserve of sand and gravel (Tr 276, 310, 315). He was then a major producer of sand and gravel and needed different types of material. His brother went through the dry washes with a portable shovel, testing to get material that would pass specifications to meet different construction projects. Some fine material, ideal for patching concrete, was found and removed from the Las Vegas Nos. 3 and 4. Approximately 500 total tons of material were sold from all of the 27 claims which he had located.

"In 1956 or 1957, after the 21 claims in issue were sold, Mr. Bradley was hired by Mr. McCall and Mr.Nelson to dig a hole on every 10-acre tract. Material from the claims was hauled to the plant, run through the screen and delivered to the construction site. At that time, there were no washing plants in the Las Vegas area and, because the fines could not be washed

out, it was necessary to obtain material from the bottom of the dry washes. In fact, the reason Mr. Bradley located the 27 claims in 1948 was because he needed to pick and choose the material as need arose. No work was done on the claims prior to 1957, except for the small excavations in the washes. (Tr 301-302).

"At the time the claims in issue were located, the presence of cemented gravels near the surface was a detriment to the mining of gravel because it had to be blasted loose, thus raising the cost. Little or no drilling and blasting was done by the gravel operators in the Las Vegas area because the additional expense made it impossible to compete with the plantiful gravel found on areas within the valley that contained no cemented cappings. In about 1958, the gravel operators started to excavate cemented gravels by first watering the material and then loosening it with a ripper attached to a large caterpillar tractor. While this method costs a little more to mine, they found that cemented gravels can sometimes meet higher specifications thanthat which is noncemented.

"At the present time the major consideration in any decision as to the placement of a plant is the distance between the site of removal and the construction site. For, with the new methods of removal and the use of large tractors, the major expense is hauling the gravel, not mining it."

The Bureau has established that the contestees and their predecessors removed a limited amount of loose surface sand and gravel from the subdivisions in issue but that no attempt has been made to process or market the caliche or material beneath the caliche capping. Prior to July 23, 1955, there were numerous unpatented mining claims in the Las Vegas valley only a few of which were in actual operation. This includes ten thousand acres of sand and gravel claims owned or controlled by Mr. McCall, one of the contestees, through his Dredge Corporation.

The contestees established that the whole valley contains sand and gravel to a depth of one thousand feet or more and that much of it can be used for the same or similar purposes. But this does not mean that the whole valley is valuable for its mineral content. It is only those tracts with a deposit which can be extracted, processed, and marketed at a profit in competition with other deposits that are valuable and mineral in character. The contestees believe that the caliche material can be blasted and processed at a competitive price at the present time. They have received a patent for 230 acres which has over three and one-half million yards of sand and gravel in every ten feet of depth. If they had a market for this amount they would have a reserve supply for one hundred years.

The contestees offered no evidence to suggest that they had a market for any more than this amount of material either in 1948, 1953, or 1955. Without an expanded market it was not economically feasible to produce the material on the contested tracts. Consequently it had no value as a mineral prior to July 23, 1955.

Accordingly, all the subdivisions in issue are declared nonmineral in character as of July 23, 1955, and the patent application is dismissed.

Appeal

The right of apeal to the Board of Land Appeals, Office of the Secretary, is allowed in accordance with the regulatons in 43 CFR Part 1840. However, if an appeal is to be taken, the notice of appeal must be filed in this office (not the Board) so that the case file can be transmitted ta the Board. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations.

/s/ Graydon E.Holt
Hearing Examiner

FEB 26 19

No. 80-1180

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. MCCALL, SR., ET AL., PETITIONERS

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior properly rejected petitioners' patent applications for portions of three sand and gravel mining claims because the rejected portions were nonmineral in character.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 628 F. 2d 1185. The district court did not issue an opinion. The opinion of the Interior Board of Land Appeals (Pet. App. A-21 to A-40) is reported at 7 I.B.L.A. 21.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1980 (Pet. App. A-1). The order of the court of appeals denying rehearing and rehearing en banc (Pet. App. A-10 to A-11) was entered on October 17, 1980. The petition for a writ of certiorari was filed on January 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The suit arose from the Secretary of the Interior's rejection of petitioners' patent applications for certain portions of three sand and gravel claims on the ground that the rejected portions of the claims were nonmineral in character. The relevant facts may be summarized as follows:

In 1948, petitioners' predecessors in interest located 27 sand and gravel claims, of 80 acres each, on the public lands approximately five miles from downtown Las Vegas, Nevada. Subsequently, the petitioners filed patent applications seeking to obtain title to the claims. The Secretary of the Interior, acting through the Bureau of Land Management ("BLM") determined, *inter alia*, that petitioners were entitled to a patent for certain portions of claims Las Vegas Nos. 1, 2, 7, 18, and 27, but that other portions of those claims were not mineral in character and, thus, could not be patented to petitioners.[1] Consequently, BLM filed a contest

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[1]The Secretary also determined, in a separate proceeding, that petitioners had failed to make a discovery on 21 other claims in the Las Vegas group and invalidated those 21 claims. Those 21 claims are the subject of a separate petition in No. 80-1181.

complaint, alleging that the remaining unpatented land on the five claims was nonmineral in character[2] (Pet. App. A-41 to A-43).

An administrative hearing was conducted in 1969 before an administrative law judge (ALJ) at which petitioners and the government presented testimony and other evidence. Following the hearing, the ALJ entered a decision dismissing the patent application as to all challenged portions of the five claims (Pet. App. A-41 to A-53).

The petitioners perfected an administrative appeal to the Interior Board of Land Appeals (IBLA) which affirmed in part and reversed in part (Pet. App. A-21 to A-40). 7 I.B.L.A. 21 (1972). Reviewing the record, the IBLA found there was insufficient evidence to support the ALJ's determination that the unpatented portions of claims Las Vegas Nos. 1 and 2 significantly differed from the patented portions. Accordingly, the IBLA determined that the petitioners were entitled to a patent for the entire 80 acres of each of those claims (Pet. App. A-36 to A-37). The IBLA found, however, that the evidence showed that the challenged portions of claims Las Vegas Nos. 7, 18, and 27 were capped at the surface by a cemented layer of caliche which made extraction of the sand and gravel economically infeasible (Pet. App. A-37 to A-39). The IBLA accordingly upheld the ALJ's decision as to the disputed 140 acres on those three claims.

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[2]The particular acreage being contested on each claim at issue was as follows (Pet. App. A-43):

Las Vegas No. 1 — 10 acres
Las Vegas No. 2 — 20 acres
Las Vegas No. 7 — 40 acres
Las Vegas No. 18 — 30 acres
Las Vegas No. 27 — 70 acres

In 1976, more than 4 years after the IBLA had entered its decision, the petitioners filed a complaint in the district court alleging that the Secretary had acted arbitrarily and capriciously in rejecting their patent application with respect to the 140 acres. The Secretary filed a motion for summary judgment, based on the administrative record. Petitioners opposed the motion, contending, first, that the "10-acre rule," by which the Secretary analyzes the mineral character of a placer claim by 10-acre tracts within the claim, was erroneous, and, second, that the Secretary had improperly applied the rule by requiring petitioners to show actual sales of sand and gravel from each 10-acre tract to establish marketability. The matter was referred to a magistrate who recommended that the determination of the Secretary be sustained (Pet. App. A-12 to A-19). The district court, after considering petitioners' objections to the magistrate's recommendations, entered judgment in favor of the Secretary (Pet. App. A-19 to A-20). The court of appeals affirmed (Pet. App. A-1 to A-9).

ARGUMENT

This case presents no issue warranting review by this Court. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Section 1 of the general mining law (the Act of May 10, 1872, ch. 152, 17 Stat. 91), 30 U.S.C. 22, provides that "* * * all valuable mineral deposits in lands belonging to the United States * * * shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase * * *." Thus, an individual may claim for himself such valuable minerals as he may discover on the public lands and he may obtain a patent to the lands on which the valuable minerals occur. In the case of a placer location, such as the claims at issue, an individual may

claim up to 20 acres for a single claim, while an association or group may claim 20 acres for each individual claimant, up to a maximum claim of 160 acres (30 U.S.C. 35, 36).

As the sole purpose of the mining laws is to encourage actual mineral development, *United States* v. *Coleman*, 390 U.S. 599, 602 (1968), a mining claim, to be valid, must strictly comply with the requirements of the mining laws. A basic requirement of the mining laws is that the claimant must make a "discovery" of a "valuable mineral deposit" within the limits of each claim. *Cole* v. *Ralph*, 252 U.S. 286, 295-296 (1920). To show a discovery, a claimant must physically expose a mineral deposit of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a mine. Stated differently, a claimant must show that the minerals which he has uncovered can be extracted, removed and marketed at a profit. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.4 (1978); *United States* v. *Coleman, supra*, 390 U.S. at 602; *Chrisman* v. *Miller*, 197 U.S. 313, 321-323 (1905).

A second independent requirement of the mining laws is that the lands upon which a mining claim is located must be "mineral in character." *Cameron* v. *United States*, 252 U.S. 450, 456, 464 (1920). In applying this requirement, the Secretary has, for at least 70 years, employed a standard, known as the "10-acre rule," by which a claimant must show, if challenged, that each 10-acre subdivision of his placer mining claim is "mineral in character." *American Smelting & Refining Co.*, 39 Pub. Lands Dec. 299 (1910); *United States* v. *Bunkowski*, 79 Interior Dec. 43, 54-55 (1972); *United States* v. *Meyers*, 17 I.B.L.A. 313, 316-317 (1974). Land is "mineral in character" when known conditions reasonably engender the belief that the land contains

minerals of such quality and quantity as to render its extraction profitable and to justify expenditures to that end.[3] *Diamond Coal & Coke Co.* v. *United States*, 233 U.S. 236, 240 (1914). The "mineral in character" criterion differs from the discovery requirement in that a claimant need not actually physically expose a mineral deposit; the mineral character of the contested portions of the claim may be established by geological inference or by less definitive physical evidence. *Laden* v. *Andrus*, 595 F. 2d 482, 487-488 (9th Cir. 1979); *California* v. *E.O. Rodeffer*, 75 Interior Dec. 176, 180-181 (1968). Since the mining laws provide that placer entries should conform as nearly as practicable to surveyed subdivisions and contemplate that a placer location may be made of 10-acre tract, see 30 U.S.C. 35, 36, the 10-acre subdivision is used as the unit for determining mineral character. *American Smelting & Refining Co., supra*, 39 Pub. Lands Dec. at 301.

2. Petitioners contend (Pet. 18-27) that the "10-acre rule" is an unwarranted extension of the discovery requirements of the mining laws. As the court of appeals noted (Pet. App. A-3), however, petitioners failed to raise this issue in their objections to the proposed findings and recommendations of the magistrate or in their opening brief in the court of appeals. The court of appeals properly ruled that petitioners' failure to preserve the issue was a sufficient ground for affirming the Secretary's determination on this question. 28 U.S.C. 636(b)(1); *United States* v. *Walters*, No. 78-3653

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[3]Section 3 of the Act of July 23, 1955, ch. 375, 69 Stat. 368, 30 U.S.C. 611, withdrew common varieties of sand, gravel and other similar materials from further location under the mining laws. *Coleman, supra*, 390 U.S. at 603-605. Consequently, claimants, such as petitioners, who have located common varieties of sand and gravel prior to the effective date of the Act, must show that the lands in question were mineral in character as of July 23, 1955. *Cameron* v. *United States*, 252 U.S. 450, 456 (1920); *Hallenbeck* v. *Kleppe*, 590 F. 2d 852, 856 (10th Cir. 1979); *Melluzzo* v. *Morton*, 534 F. 2d 860, 862 (9th Cir. 1976).

(6th Cir. Jan. 20, 1981), slip op. 3-6; *American Meat Institute* v. *Environmental Protection Agency*, 526 F. 2d 442, 459 n.34 (7th Cir. 1975); *Mississippi River Corp.* v. *FTC*, 454 F. 2d 1083, 1093 (8th Cir. 1972).

3. The court of appeals held, in the alternative, that the "10-acre rule" was valid and had been properly applied by the Secretary here (Pet. App. A-3 to A-9). This determination was also correct. As already noted, Section 1 of the general mining law, 30 U.S.C. 22, provides that "* * * all valuable mineral deposits * * * shall be free and open to exploration and purchase, and *the lands in which they are found* to occupation and purchase * * *" (emphasis added). Private acquisition of interests in the public lands for purposes other than actual mining is not authorized by the general mining law. *Coleman, supra*, 390 U.S. at 602. It follows that the mining laws may not be used as a vehicle for obtaining title to public land which does not contain marketable minerals. As the Secretary stated in *Ferrell* v. *Hoge*, 29 Pub. Lands Dec. 12, 15 (1899):

> Considering all the statutes relating to mining claims it seems clear that it was not their purpose to permit the entire area allowed as a placer claim to be acquired as appurtenant to placer deposits irrespective of their extent. Under the law discovery of mineral deposits is an essential act in the acquisition of mineral land, and while a single discovery is sufficient to authorize the location of a placer claim and may, in the absence of any claim or evidence to the contrary, be treated as sufficiently establishing the mineral character of the entire claim to justify the patenting thereof, such single discovery does not conclusively establish the mineral character of all the land included in the claim so as to preclude further inquiry in respect thereto.

Petitioners assert (Pet. 18-19) that the "10-acre rule" contravenes the established principle that only one discovery need be made for a single valid claim. However, as the court of appeals correctly pointed out (Pet. App. A-5), the "10-acre rule" does not require more than one discovery per claim, as proof of discovery requires a showing of an exposed mineral deposit on the claim while the fact that lands are "mineral in character" may be established by geological inference and with the existence of a market.

Similarly, as the court of appeals also correctly observed (Pet. App. A-5 to A-7), the "10-acre rule" does not require a claimant to show that he actually sold materials from the contested portions of the claims. Here, the Secretary did not base his determination simply on the ground that petitioners had failed to show any actual sales of materials from the contested portions of the claims; rather, the Secretary's decision was based on the fact that the caliche capping on those portions increased extraction and processing costs to the point that exploitation was economically infeasible (Pet. App. A-38 to A-39). Indeed, the IBLA expressly noted that a claimant need not show actual sales (*id.* at A-31).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981

DOJ-1981-02

No. 80-1180

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

WILLIAM A. McCALL, SR., and THE ESTATE OF OLAF HENRY NELSON, Deceased,
Petitioners,

v.

JAMES G. WATT, Secretary of the Interior of the United States of America, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. 78-1065

PETITIONERS' RESPONSE TO BRIEF OF THE FEDERAL RESPONDENTS

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Case No. 80-1180

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' RESPONSE TO BRIEF OF THE FEDERAL RESPONDENTS

The Government's brief recites platitudes which are beside the point in order to divert the Court's attention from the important issue presented by this case: that the Court should act now to check the Interior Department's Bureau of Land Management in its progressive alteration of the mining law from the way Congress wrote it, by substituting administrative policy in place of the law.

Petitioners made abundantly plain at every stage of the case that they are seeking patent only to lands which contain the valuable mineral deposits offered by Congress in 30 U.S.C. §22. The Government's own witnesses established that each ten-acre tract of the partially patented mining claims here in question contains a large tonnage of the valuable sand and gravel which was locatable and patentable at the time when patent was applied for. The Government's witnesses failed to show that the increased cost of producing the material from areas which contain a layer of cemented gravel at or near the surface would prevent mining there. To the contrary, the evidence showed that the cemented gravels make high specification material. Although the profit might be smaller than that from loose surface gravels, the potential for profit was still present, and the mining of such gravel has become

easier and cheaper with the passage of time as heavier machinery became available.

The Government's position in this case has been to disclaim that it required proof of actual sales and at the same time to grant patent only to those portions of the claims where the agency recognized that active commercial production had occurred.

In practice, the agency has followed the discredited doctrine of Osborne v. Hammit, 377 F Supp 977 (D Nev. 1964) and denied patent unless the claimant proved that each tract was "mineral in character" by "demonstration of removing and marketing at a profit." 79 I.D. at 465, Appendix to Petition A-39. This is certainly extending the "discovery" requirement to "mineral in character", even though the agency denies doing so. If, as the agency asserts, "mineral in

character" can be proven by geologic inference without actually exposing the valuable mineral deposit, then the marketability aspect of the discovery requirement should not be extended to every ten-acre tract of a mining claim where discovery is acknowledged to have been made on another part of the claim.

No statute authorizes the Government's "ten-acre rule", which is an amendment to the mining law by administrative policy, recognized in the court below as a question of first impression in the courts. This Court should grant review of this issue, and also of the "too much" administrative policy which was the basis for the agency's rejection of the tracts here in question. (See Petition p. 23).

The Government's brief could not deny that the fourteen ten-acre tracts were lopped off the claims patented, not for lack of mineral value but because

they contained too much of the mineral for which portions of the claims were patented. Here again, no statute authorizes the Bureau of Land Management to limit the amount of mineral ground which a citizen may acquire. This Court should restrict the agency to administration of the mining law as it was written by Congress, instead of changing the law by administrative policy decisions which serve as precedents of lasting detriment to the mining industry.

Addressing the Tenth Annual Rocky Mountain Law Institute in 1965, H. R. Hochmuth, then Associate Director of the Bureau of Land Management, stated candidly that what the agency was administering was not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of the agency's own making. That policy has gone entirely too far. Congress, not

the agency, makes the laws.

In Ernst and Ernst v. Hochfelder, 425 U.S. 185, 213 (1976), this Court did not hesitate to correct an over-zealous effort of the prestigious Securities and Exchange Commission to expand the law by administrative interpretation beyond what Congress had enacted. Likewise here, this Court should hold back the Interior Department's Bureau of Land Management from rewriting the law by deciding cases on the basis of administrative policy.

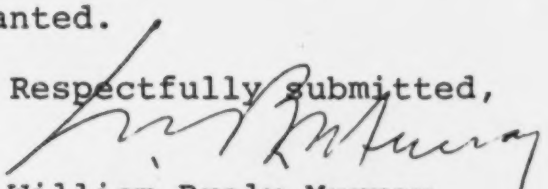
CONCLUSION

The steady expansion of the Bureau of Land Management's power over mining claims by decisions of the Interior Department's administrative tribunals is subjecting the miners of this country to a rule not of law but of agency policy. Administrative legislation has gone too far, and it is time for this Court to

halt the process.

Accordingly, petitioners respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,



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